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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 1687, 1712

UNITED STATES TRUST COMPANY OF NEW YORK, ETC.,
Appellant,

—against—

THE STATE OF NEW JERSEY, ET AL.,
Appellees.

DANIEL M. GABY,
Appellant,

—against—

THE PORT OF NEW YORK AUTHORITY, ET AL.,
Appellees,

and

UNITED STATES TRUST COMPANY OF NEW YORK,
Intervenor.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL OF DANIEL M. GABY

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL OF DANIEL M. GABY

Pursuant to Rule 16 of the Revised Rules of this Court The Port Authority of New York and New Jersey *et al.* move to dismiss the appeal by Daniel M. Gaby from the judgment of the Supreme Court of New Jersey on the ground that the issue raised by the appeal does not present a substantial federal question.

Brief in Support of Motion

Statement

It is the Port Authority's position that the appeal by Daniel M. Gaby should be dismissed summarily for want of a substantial federal question. The only issue attempted to be raised by the appeal is the contention that the 1962 statutory covenant between the States of New Jersey and New York and Port Authority bondholders, partially restricting the amount of monies which the Authority may spend for passenger rail transit, required specific Congressional consent under the Constitution's Compact Clause (Art. 1, § 10, Cl. 3). It is evident, however, that such claim is clearly erroneous in view of this Court's decision in *Courtesy Sandwich Shop et al.* v. *Port Authority et al.*, 12 N.Y.2d 379, 190 N.E.2d 402, *appeal dismissed for want of a substantial federal question*, 375 U.S. 78, *reh. den'd*, 375 U.S. 960 (1963). The *Courtesy* case held that when Congress consented to the 1921 Port Compact and the 1922 comprehensive plan it consented to future bi-State action in furtherance of Port purposes. The courts below—the New Jersey Supreme Court and the New Jersey Superior Court—did not reach the issue of the constitutionality of the 1962 covenant in view of their decision in the related litigation brought by the United States Trust Company against the State of New Jersey upholding the validity, under the Contract Clauses of the Federal and New Jersey Constitutions, of the 1974 New Jersey legislation repealing the 1962 covenant.

Appellant's claim that the covenant required specific Congressional consent since it was not in furtherance, but rather in derogation, of the Port Authority's original purposes is frivolous. It ignores, as established herein and found by both courts below, that the primary purpose for the Port Authority's creation was not the development of passenger rail facilities. Furthermore, as noted by the trial court, the covenant was designed to further the Au-

thority's Congressionally consented-to powers by enabling it to enter, for the first time, the field of deficit rail transit without losing its historic and essential ability to attract private investment in its obligations.

Counter-Statement of Facts

A. The primary purpose for the creation of the Port Authority was to solve problems relating to the movement of freight.

Adoption of the 1921 Compact creating the Port Authority was the direct result of the demonstrated inadequacies of the Port of New York's freight terminal facilities during World War I and the controversy between New Jersey and New York interests over allegedly discriminatory freight rates and practices which culminated in the *New York Harbor Case*, 47 I.C.C. 643 (1917). There, the I.C.C., in declining to disturb the uniform freight rates then being charged throughout the bi-State Port of New York, ventured the opinion that the solution to the port's problems "is to be found, not in a change in the rate adjustment, but in the united efforts of the people of the district and the carriers toward the improvement of conditions in which their interests are mutual." 47 I.C.C. 643, 734. In 1917 both New York and New Jersey appointed commissions to study the Port problem and to make appropriate recommendations. After a three-year study, the two commissions, which had organized themselves as a single body, known as the New York, New Jersey Port and Harbor Development Commission, rendered a comprehensive 495 page report containing the most complete study ever made of the history, conditions, and freight facilities in the Port of New York.[1]

The Report recommended a comprehensive plan for the development of the Port of New York which, as found by

[1] New York, New Jersey Port and Harbor Development Commission, Joint Report, 1920.

the trial court, "addressed itself exclusively to the transportation and distribution not of persons but of freight and cargo by rail, and to a lesser extent by ship and motor truck." [2] The Report also recommended the adoption of a compact between the States establishing a bi-State Port of New York District and creating a single Port Authority.

The following year the Port Authority was created pursuant to an interstate compact between the States of New Jersey and New York which was consented to by Congress.[3] The Compact conferred upon the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said [Port of New York] district . . ." These powers, however, were not to be exercised by the Port Authority until the Legislatures of both States approved a comprehensive plan for the development of the Port (Article VI).

Thus, although it is true, as appellant claims, that the term "transportation facility" is defined in Article XXII of the Compact to include

> "railroads . . . designed for use for the transportation or carriage of persons or property"

the crucial point is that Article VI, by its express terms, provides nothing more than statutory authorization for possible future Port Authority operation of terminal and transportation facilities and does not impose a duty on the Port Authority with respect to developing such facilities.

Although the two States vested their new bi-State agency with broad general powers, they did not surrender

[2] The trial court went on to point out that: "In its 474 pages, plus appendices, the only significant discussion of passenger traffic in the Report is contained in the section dealing with ferries and vehicular tunnels." (Gaby Appendix, p. 48).

[3] Ch. 151, Laws of N.J., 1921, N.J.S.A. 32:1-1 *et seq.*; Ch. 154 Laws of N.Y., 1921, McKinney's Unconsol. Laws § 6401 *et seq.*; consented to by Congress, Pub. Res. 17, 67th Cong., 1st Sess., 42 Stat. 174 (1921).

any of their sovereign powers over Port development. The Compact fully preserves their right to act in this field, either directly or through their other agencies. The Compact not only prevents the Port Authority from taking any property owned by the States, their agencies, and political subdivisions, without consent (whether or not the property is devoted to Port purposes), but also specifically declares that nothing therein shall "impair the powers of any municipality to develop or improve Port and terminal facilities." (Articles VI and IX).

The Port Authority's first concern was working out the details of a comprehensive plan for the future development of the Port District. The plan which it recommended—a plan substantially similar to that advanced by the New York, New Jersey Port and Harbor Development Commission—was adopted by the two States in a 1922 interstate compact to which Congress consented.[4]

The 1922 comprehensive plan which the States enacted and to which Congress consented is primarily concerned with railroad freight distribution. As found by the trial court, it has absolutely nothing to do with passenger operations:

> "In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities, and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish 'the most expeditious, economical and practical

[4] Ch. 9, Laws of N.J., 1922, N.J.S.A. 32:1-25 *et seq.*; Ch. 43, Laws of N.Y., 1922, McKinney's Unconsol. Laws § 6541 *et seq.*; consented to by Congress, Pub. Res. 66, 67th Cong., 2nd Sess., 42 Stat. 822 (1922).

transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people.'" (Gaby Appendix, p. 50)

The plan adopted by the two States and consented to by Congress was not only designed to meet the commercial needs of the Port in times of peace but also the needs of the United States in times of war. Thus Congress, in the Joint Resolution granting consent to the comprehensive plan, declared:

"... the carrying out and executing of the said plan will better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation. ..." 42 Stat. 822 (1922).[5]

In its *per curiam* opinion, the New Jersey Supreme Court also specifically rejected appellant's contention that the Port Authority had a duty under the Compact and comprehensive plan to effectuate mass transit projects:

"That the Authority's involvement in transportation matters was contemplated is obvious from a reading ... of the Comprehensive Plan as well as the Compact; but it requires a quantum leap to derive therefrom a mandate (as distinguished from the power) to develop a plan for a particular kind or method of transportation, to wit, mass transit." (Gaby's Appendix, pp. 5-6)

[5] As found by the New Jersey Supreme Court in an earlier case, *Port of New York Authority* v. *City of Newark*, 20 N.J. 386, 395 (1956),

"[O]ne of the foremost considerations in the minds of the respective Legislatures when they created the Port of New York Authority and adopted the Comprehensive Plan was the development and maintenance of the Port so that it could be used efficiently by our armed forces in time of war."

Pursuant to the 1921 Compact, the 1922 comprehensive plan statutes and subsequent amendments and supplements thereto, the Port Authority presently owns and/or operates the Holland and Lincoln Tunnels; the George Washington, Outerbridge, Bayonne and Goethals Bridges; Newark and New York International Airports, Teterboro and LaGuardia Airports; two heliports; Port Newark, the Hoboken Port Authority Marine Terminal, the Elizabeth Port Authority Marine Terminal, the Columbia Street Marine Terminal, the Erie Basin Port Authority Marine Terminal and a Mid-Manhattan Consolidated Passenger Ship Terminal; the Port Authority Bus Terminal, the George Washington Bridge Bus Station, the Newark and New York Union Motor Truck Terminals; the Port Authority Trans-Hudson rail system [operated by the Port Authority's wholly-owned subsidiary, the Port Authority Trans-Hudson Corporation (PATH)] and the World Trade Center.

B. The Port Authority was created to be a self-supporting agency of State government.

The "WHEREAS" clauses of the 1921 Compact creating the Authority recognized that the development of the port "will require the expenditure of large sums of money and the cordial cooperation of the states of New York and New Jersey in the encouragement of the investment of capital. ..." Article VI authorized the Port Authority "to borrow money and secure the same by bonds or by mortgages." Article VII provided that "The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof." And Article XV provided that "Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures," the States will each appropriate up to $100,000 a year. Thus, the 1921 Compact, to which Congress consented, envisioned the Port Authority's role to be that of a self-supporting agency of State government.

The Compact and the comprehensive plan statutes clearly contemplated that the Authority would finance each of its projects by the sale of revenue bonds which would be repaid by user charges. The Authority's first annual report to the two Legislatures discusses the financial methods available to it to implement the comprehensive plan. The report noted that because of the Authority's lack of access to tax funds,

> "It must secure capital from investors on securities to be based on the properties it constructs, purchases or leases in carrying out its plans." (Report with Plan for the Comprehensive Development of the Port of New York, 1921, p. 23).

The report emphasized that

> "The soundness of the enterprises must be proved by economic data, therefore the work can be undertaken only when investors have been satisfied that economic justification exists. The cost of service must necessarily provide for operation and maintenance and for interest upon and amortization of the bonds or other securities." (p. 23).

In 1924 Governor Alfred E. Smith of New York, once a Commissoner of the Port Authority, described the Authority as providing a

> "thoroughly modern method of financing public improvements without burden to the taxpayers of the State, maintaining the State's ownership, yet financing on the basis of the economic value of the improvement itself." Public Papers of Alfred E. Smith, 1924. Annual Message to the Legislature, p. 39.

In the same year that Governor Smith stated his approval of the authority technique, the United States War Department refused to sell the Hoboken Shore Line Railroad, which it acquired during World War I, to the Port Authority on the ground that all the Authority could offer was $1 million of its own bonds, secured by nothing more than the Railroad's income.[6] The Port Authority could offer nothing more for this freight railroad which was a part of Belt Line No. 13 of the comprehensive plan statutes,[7] because, as we have seen, the 1921 Port Compact expressly denied it the power to pledge the credit of either State without specific State consent. Art. VII, Ch. 151, Laws of N.J. 1921; Ch. 154, Laws of N.Y., 1921.

As a result of the War Department's refusal to accept Port Authority bonds in payment, the Authority was unable to acquire the Shore Line Railroad.

Similar financial difficulties in the middle 1920's threatened to prevent the Authority from constructing its legislatively authorized interstate bridges. To overcome these difficulties, the Legislatures adopted a plan under which the States advanced approximately 25% of the total estimated cost of construction for each bridge, while the Port Authority financed the remaining 75% of their cost through the sale to private investors of bonds secured by the entire net revenues of each particular bridge. The States' advances were a junior obligation on those revenues. Arthur Kill Bridge financing legislation, Ch. 37, Laws of N.J., 1925; Ch. 210, Laws of N.Y., 1925. George Washington Bridge financing legislation, Ch. 6, Laws of N.J., 1926; Ch. 761, Laws of N.Y., 1926. Bayonne Bridge financing legislation, Ch. 3, Laws of N.J., 1927; Ch. 300, Laws of N.Y., 1927, as amended. In addition to these State advances, the Legislatures entered into statutory covenants with Port Authority bondholders. Thus § 5 of the Arthur Kill Bridge financing legislation provides that:

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[6] The difficulties encountered by the Port Authority in its attempted acquisition of this railroad are recounted in E. Bard, *The Port of New York Authority* 140-154 (Columbia Univ. Press, 1942).

[7] § 5, Ch. 9, Laws of N.J., 1922; § 5 Ch. 43, Laws of N.Y., 1922.

"The State of New Jersey (the State of New York by appropriate legislation concurring herein) does pledge to and agree with those subscribing to the obligations issued by the Port Authority for the construction of the said bridges and incidental purposes that the State will not authorize the construction or maintenance of any other highway crossings for vehicular traffic of [sic] the waters of the Arthur Kill, between the two States in competition with the said bridges, nor will it limit or alter the rights now vested in the Port Authority to establish and levy such charges and tolls as it may deem convenient or necessary to produce sufficient revenue to meet the expense of maintenance and operation and to fulfill the terms of the obligations assumed by it in relation to such bridges until the said obligations, together with interest thereon, are fully met and discharged."

Similar provisions are found in the financing legislation for the George Washington and Bayonne Bridges. *Id.*

The early traffic across these bridges, however, fell below predictions and it became increasingly difficult for the Authority to meet debt service requirements on its bridge bonds. A distinct possibility of default developed. In 1930-1931, the States acted to prevent a possible default and to expand the Authority's ability to finance new projects by designating it as their sole agent for future interstate vehicular crossings, Ch. 4, Laws of N.J., 1931; Ch. 47, Laws of N.Y., 1931, after transferring the Holland Tunnel to it. Ch. 247, Laws of N.J., 1930; Ch. 421, Laws of N.Y., 1930. The 1931 Bridge and Tunnel Unification Acts likewise contained covenants by the Legislatures against any impairment of the Port Authority's power to set tolls as well as guarantees to Port Authority bondholders that the States would not authorize vehicular crossings within the statutorily defined Port District in competition with those of the Authority. § 12, Ch. 4, Laws of N.J., 1931; § 12, Ch. 47, Laws of N.Y., 1931.

In addition, as part of the States' 1931 legislative program, the Port Authority was directed to pool statutorily defined revenues in a General Reserve Fund, in an amount equal to 10% of outstanding Port Authority indebtedness. This fund has been pledged by the Port Authority to bondholders so that their security is not limited to the revenues of individual facilities. Ch. 5, Laws of N.J., 1931, as amended by Ch. 197, Laws of N.J., 1945; Ch. 48, Laws of N.Y., 1931, as amended by Ch. 163, Laws of N.Y., 1945. This pooling arrangement, using the revenues produced by the Holland Tunnel, enabled the Port Authority to honor its obligations on bridge bonds and on those for Inland Terminal No. 1 even though deficit operations were initially involved. Later, pooling permitted the Port Authority to embark upon a refunding program of its prior special issues in connection with the financing of the Lincoln Tunnel.

The Port Authority's financial position improved as its various facilities—including such post-war facilities as airports—achieved self-supporting status. The 1947 air terminal statutes, like the bi-State bridge and tunnel legislation, contain statutory covenants and guarantees to investors in Port Authority securities. Ch. 43, Laws of N.J., 1947; Ch. 802, Laws of N.Y., 1947. Section 12 of this legislation provides that "The two States covenant and agree with each other and with the holders of any bonds of the Port Authority issued or incurred for air terminal purposes" that so long as any such bonds remain outstanding "the two States will not . . . diminish or impair the power of the Port Authority to establish, levy and collect landing fees, charges, rents, tolls or other fees, in connection therewith [air terminals]."

C. The Port Authority's role in solving the Port District's commuter rail problem prior to 1960.

Following World War I, an increase in population in suburban areas of the Port District brought with it a seri-

ous suburban transportation problem. While New York State was primarily concerned with the improvement of rapid transit facilities connecting New York City and Westchester County (Ch. 591, Laws of N.Y., 1921), New Jersey's problem was trans-Hudson. A solution to the trans-Hudson problem involved not only improved rail facilities within New Jersey, but also speedier and more convenient access to Manhattan.

The New Jersey Legislature first focused on the commuter rail problem in 1922 when it established the North Jersey Transit Commission to study and report upon a plan for providing a comprehensive scheme of rapid passenger transit between northern New Jersey communities and New York City. Ch. 104, Laws of N.J., 1922. Significantly the preamble to this act noted that the Port Authority's comprehensive plan legislation enacted earlier that year, "does not include the problem of passenger traffic in the territory covered by said port development plan."

In 1927 the New Jersey Legislature attempted to supplement the Port Authority's comprehensive plan in order to involve it in passenger rail problems. However, although the necessary concurrent legislation was passed by the New York Legislature the following year, it was vetoed by Governor Alfred E. Smith. The Governor's veto message expressed his belief that the solution of other Port problems was more deserving of Port Authority attention, especially the freight distribution problem which, in his words, "always has been the main object and purpose of the Port of New York Authority."[8] As the trial court noted, "Governor Smith's veto to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next thirty years." (Gaby's Appendix, p. 61)

[8] Public Papers of Governor Alfred E. Smith of 1928, 187-88 (L.B. Lyon Co., 1938).

During this thirty year period there was a host of studies by both public and private agencies dealing with this problem. *Ibid.* In commenting on the failure of these efforts, the trial court aptly characterized them not as "failures of purpose, effort or imagination, but the failure to find the source of funds required to implement any plan." *Ibid.*

In the 1950's, as the financial plight of the commuter railroads worsened, the States considered what role, if any, the Port Authority should play in dealing with this emerging problem. The initial answer of the States was the Port Authority commuter car program. In 1959 they enacted concurrent legislation providing that "Upon the election by either State . . . the Port Authority shall be authorized and empowered" to purchase and own railroad cars for the purpose of leasing them to commuter railroads within the electing State. § 3, Ch. 25, Laws of N.J., 1959; § 3, Ch. 638, Laws of N.Y., 1959.

In implementing this program, the States fully recognized the financially hazardous nature of passenger rail activity for an agency such as the Port Authority which was proscribed from both levying taxes and pledging the credit of New York or New Jersey and therefore must be self-supporting. Consequently, although Port Authority expertise was utilized and the Authority became deeply involved in the purchasing and leasing of railroad cars to New York commuter railroads, a method was developed to permit Port Authority participation in this field without jeopardizing its financial ability to continue its other activities as directed by the two States. The commuter railroad car program authorized by the States and utilized by the State of New York is founded upon obligations issued by the Port Authority but which, unlike any other Authority obligations before or after, are guaranteed by the State of New York under authority of a specific amendment to the New York State Constitution. Article X, Section 7. To date,

this program has resulted in the acquisition of 467 air-conditioned passenger cars and eight diesel electric locomotives for use on the Penn-Central and Long Island railroads. *See* The Port Authority of New York and New Jersey 1972 Annual Report to the Governors and Legislatures of the States, p. 15.

In view of appellant's allegations that the Port Authority has the duty of planning and effectuating a passenger rail transportation system for the Port District, it is significant that at the very time the States of New Jersey and New York imposed on the Authority the very limited duties involved in the commuter car program, they created a wholly new bi-State agency, the New York-New Jersey Transportation Agency, to be responsible for their mass transit problems. Ch. 13, as amended by Ch. 14, Laws of N.J., 1959; Ch. 420, Laws of N.Y., 1959. This agency unlike the Port Authority, was specifically created for the purpose of serving

> "as a public agency of the states of New York and New Jersey in dealing with matters affecting public mass transit within and between the 2 states." N.J.S.A. 32:22A-6.

Congress consented to the bi-State legislation creating this mass transportation agency.[9] 73 Stat. 575 (1959). Thus, neither the States of New Jersey and New York, nor Congress, could have believed, as appellant would have this Court believe, that there was already in existence prior to 1959, a Congressionally-consented-to bi-State agency created primarily to deal with mass transit problems in the Port of New York District.

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[9] The Compact provided that the agency was to continue in existence until June 13, 1961, but that its existence could continue thereafter as concurrent legislation might provide (Article 4, § 4.6). In 1961 the Legislatures of both States extended the agency's duration to June 30, 1966. Ch. 55, Laws of N.J. 1961; Ch. 273, Laws of N.Y. 1961. There was no subsequent legislation extending the existence of the agency beyond 1966.

D. The 1962 Covenant enabled the self-supporting Port Authority, for the first time, to enter the field of deficit rail transit while maintaining bondholder confidence.

In 1960, the New Jersey Senate created a bi-partisan committee to conduct "a full and unlimited investigation" of the Port Authority. Specifically, the Committee was "authorized, empowered and directed to study the entire financial structure and operations" of the Authority, and to determine "whether or not the said Port of New York Authority is fulfilling its statutory duties and obligations". Senate Resolution No. 7, 1960. (The Committee was reconstituted under Senate Resolution No. 7, 1961.)

One of the major subjects investigated was the proper Port Authority role in the commuter transit problem. The Committee commenced its analysis of this issue at its first public hearing on September 27, 1960. At that time the Authority's then Executive Director submitted to the Committee a 1958 statement that the Port Authority's Commissioners had prepared reviewing the background of the mass transit problem and its accompanying deficits "as well as a complete analysis of the financial and legal reasons why the Port Authority as a self-supporting agency could not take on the deficits of the commuter railroads in the metropolitan region". Public Hearings, September 27, 1960, p. 14.

The Executive Director noted that since the 1958 statement had been prepared, the New Jersey State Highway Commissioner, who had within his jurisdiction the State Division of Railroad Transportation, had recommended that the New Jersey Legislature adopt the so-called service contracts by which the State would subsidize the continued operation of commuter railroads and in addition that the Port Authority should participate directly in a program of commuter railroad assistance. Direct Port Authority participation in the program however, was limited to the interstate Hudson and Manhattan Railroad system.

Of all the commuter railroads, the Hudson and Manhattan's plight had long been the worst. In 1954, its creditors had forced it into reorganization under the Bankruptcy Act on the ground of insolvency. The reorganization proceeding was designed to lay the groundwork for the railroad's ultimate abandonment by its private owners. This was virtually achieved in 1959 when the Federal reorganization court left it with enough cash to continue operations for the ensuing two years but not enough money to provide needed capital improvements. *In Re Hudson & Manhattan Railroad Co.*, 174 F. Supp. 148 (S.D.N.Y. 1959), *aff'd sub nom., Spitzer* v. *Stichman*, 278 F.2d 402 (2d Cir. 1960).

As a result of its investigation, the New Jersey Senate Committee filed a detailed report, "Report of Senate Investigating Committee under Senate Resolution No. 7 of the year 1961". The Report fully sets forth the legal and practical restrictions on Port Authority financing as well as the clear legislative intent behind the 1962 covenant of providing a viable and realistic means of enabling the Port Authority to finance the acquisition, rehabilitation and operation of what would become the PATH system, with its continuing deficits, while continuing to maintain bondholder confidence.

The Report initially analyzed the nature of the Port Authority, noting that:

> "The power to tax or pledge the credit of either the State or any municipality was withheld. As a result the new agency was required to establish its facilities solely with borrowed money and the borrowing could be accomplished only in convincing prospective bondholders that the projects would be self-supporting and would produce sufficient revenues from their tolls and other charges to meet all of the Port Authority's obligations to the bondholders within the reasonable margin of safety coverage. The compact reserved to each

> State a right to provide a veto power by its Governor and each State has so provided. Detailed additional powers and the delineation of specific projects were expressly reserved for subsequent bi-state legislative authorization." p. 8.

With regard to whether the Port Authority was performing its statutory duties and obligations the Report concluded that:

> "There is no doubt in the minds of the members of the committee that the 2 States have realized their objectives in the creation of the Port Authority. They have procured vast public improvements without charge to the general taxpayers and have created a vital organization capable of continuing to provide such projects as the two States desire and which are of common benefit to both of them. Most of the serious writers of government techniques have pointed to the Authority as one of the most successful agencies of state government." p. 9.

As far as the financing of Port Authority facilities was concerned, the Committee concluded that "the basic framework and philosophy of the Port Authority with respect to its financing policies and its adherence to the principle of administering self-supporting facilities are soundly conceived." p. 12. Quoting from the report of certified public accountants retained by the Committee who investigated all aspects of the Port Authority's finances and financial structure, the Committee noted that

> " 'The contributors of the Authority's capital neither own nor operate the entity financed with their money. Since the bondholders do not exercise direct control over the Authority they have protected their investment by requiring certain covenants and guarantees as a prerequisite to lending their money.' " p. 14.

Turning specifically to the problem of the Port Authority's involvement in passenger rail transit and the history

of the 1962 bi-State legislation containing the statutory covenant, the Committee pointed out:

> "During 1961, the New York State Legislature enacted legislation which empowered the Port Authority to proceed with the acquisition, modernization and operation of the Hudson and Manhattan Railroad and coupled in the same bill an authorization for the Authority to undertake the development of a World Trade Center on the east side of lower Manhattan. *The bill contained no statutory covenant to protect Port Authority credit against future transit responsibilities which would divert its railroad deficits to revenues and reserves pledged to its bondholders. This legislation proved unacceptable to New Jersey because of the manner in which these two projects were 'packaged' in one statute and because the absence of such a statutory covenant, in our judgment, endangered the future utility of the Port Authority to the 2 States.* Accordingly, an impasse developed in 1961 between the States of New York and New Jersey on the appropriate form of legislation for these two projects." (Emphasis added.)
>
> "This Committee was convinced that the credit problem which had been pointed out by the Port of New York Authority was a valid and real one and that the Port Authority could not assume responsibility for the complete burden of the deficit-ridden commuter railroad problem in the area of northern New Jersey and New York. If the Port Authority were to receive such unrestricted responsibility, there is no question but that its sound credit position would be seriously impaired, if not destroyed, and it would become impossible for the Authority to continue to move forward either with such a rail program or with other vital transportation and terminal facilities and other facilities of commerce desired by the 2 States in continuing the Port Authority's tradition as a public agency." pp. 23-24.

The Report then goes on to discuss how "as a result of lengthy discussions" a program was worked out by the two States, whereby the Port Authority would acquire the Hudson and Manhattan Railroad and effectuate a World Trade Center on the west side of Manhattan and such bi-State legislation would contain a provision

> "Limiting by a constitutionally-protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system." p. 24.

The Report noted that

> "It was with a great deal of satisfaction that the full membership of this Committee sponsored the legislation authorizing the Port Authority to proceed with this [the 1962 H&M-WTC] project, one of the most important statutes ever to be enacted by the New Jersey State Legislature. On February 13, 1962, both Houses of the Legislature passed this Bill by unanimous votes (with one abstention in each House) and Governor Hughes signed the Bill on the same day." pp. 25-26.

Thus, it was on the basis of this Committee's recommendation that the New Jersey Legislature unanimously adopted the 1962 Hudson Tubes—World Trade Center legislation which contains the statutory covenant here in question.[19]

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[19] Governor Rockefeller, in his message approving the 1962 Hudson Tubes-World Trade Center legislation in New York, stated that:

> "To preserve the Port Authority's credit strength the bill includes a covenant by the two States that additional deficit

The Port Authority, through its wholly owned subsidiary, The Port Authority Trans-Hudson Corporation (PATH), began its operation of the old Hudson-Tubes on September 1, 1962 and initiated a long-range, multi-million dollar rehabilitation and modernization program. To date, the Port Authority has invested over $250 million in the acquisition, rehabilitation and modernization of PATH and its cumulative operating deficits since 1962 have totaled nearly an additional $220 million. 1975 Port Authority Annual Report, p. 13.

E. The hearings before the House of Representatives' Committee on the Judiciary.

The proposed covenant was also discussed during the course of lengthy hearings in 1960 before a Subcommittee of the House of Representatives' Committee on the Judiciary, the Committee which under the rules of the House is concerned with interstate compacts. *See* Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 86th Cong. 2nd Session (1960) p. 2. At that time, this Congressional subcommittee was making a detailed investigation into, among other matters, the Port Authority's financial structure.

During these hearings, the Port Authority's then Executive Director, both referred to and answered questions relating to the covenant in his live testimony (*Id.* at 1559-1562) and submitted to the Sub-committee the statement discussing the covenant which he had presented to the New Jersey Committee less than two months earlier. This statement was reprinted in full by the House Judiciary Sub-committee in the official report of its hearings. *Id.* at 1594-1603.

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financing of future railroad projects will only be undertaken within the financial limits set forth in their covenant." New York State Legislative Annual—(1962) pp. 322, 324.

The knowledge of the Judiciary Committee concerning the 1962 statutory covenant is particularly significant since during the very period in question the Chairman of the Committee, Congressman Emanuel Celler of New York, who was conducting the investigation, had introduced into the House of Representatives, in February, 1960, a bill providing that:

> "all legislation hereafter enacted by the compacting States amending or supplementing this compact [the 1921 Port Authority Compact] shall not become effective until approved by the Congress." H. J. Res. 615.

This bill was never enacted into law. It died in Congressman Celler's own Judiciary Committee.

Significantly, although the House Judiciary Committee was very much concerned with the issue of Congressional consent, at no time during the course of its lengthy hearings was it even suggested that the proposed statutory covenant might require additional Congressional consent in order to be effective.

ARGUMENT

No substantial federal question is involved on this appeal since it is clear that specific Congressional consent was not required for the 1962 statutory covenant which appellant is here challenging.

The New York Court of Appeals, in *Courtesy Sandwich Shop et al.* v. *Port Authority et al.*, 12 N.Y.2d 379, 190 N.E. 2d 402, *appeal dismissed for want of a substantial federal question*, 375 U.S. 78, *reh. den'd* 375 U.S. 960 (1963), held that when Congress consented to the 1921 Port Compact and to the 1922 comprehensive plan statutes it consented to future bi-State action in furtherance of port purposes. More specifically, the court ruled that no

additional Congressional consent was necessary for the 1962 bi-State Hudson Tubes-World Trade Center legislation, which included the 1962 covenant here in question, since

> "assuming consent to be required for this sort of concurrent action, the congressional consent originally given in 1921 and 1922 to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. (Pub. Res. No. 17, 67th Cong., 1st Sess., 42 U.S. Stat 822.) Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus 'such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other'. Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should 'from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement.' Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact." 12 N.Y.2d 379, 391, 190 N.E.2d 402, 406.

In so holding, the court relied on the fact that when Congress consented to the 1921 Compact, it consented "to the said agreement and to each and every part and article thereof." 42 Stat. 174 (1921). Article III, which created the Port Authority, provided that it should have not only "the powers and jurisdiction hereinafter enumerated," but also

> "such other and additional powers as shall be conferred upon it *by the legislature of either state concurred in by the legislature of the other* • • •." (Emphasis added.)

Similarly, Article VII, after an enumeration of specific delegated powers in Article VI for transportation and terminal facilities, provided:

> "The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it *from time to time by the action of the legislature of either state concurred in by the legislature of the other.*" (Emphasis added.)

Both Articles III and VII, themselves specifically consented to by Congress, thus clearly provide that additional powers and duties in furtherance of port purposes might be delegated by the two States acting together without further Congressional consent.

Likewise, Article XI provided that the Port Authority should

> "from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved *by the legislatures of the two states*, they shall be binding upon both states with the same force and effect as if incorporated in this agreement." (Emphasis added.)

Also directly in point is § 7 of the 1922 comprehensive plan legislation, which was also consented to by Congress, and which provides that

> "The right to add to, modify or change any part of the foregoing comprehensive plan is reserved *by each state, with the concurrence of the other.*" (Empha-

sis added.) Ch. 9, Laws of N.J., 1922; Ch. 43, Laws of N.Y., 1922.[11]

The actual decision rendered by the New York Court of Appeals in *Courtesy* was the "entry of a judgment that chapter 209 of the Laws of 1962 is constitutional." 12 N.Y. 2d 379, 400, 190 N.E. 2d 402, 412. Chapter 209, together with its New Jersey equivalent, Chapter 8, contains the 1962 statutory covenant here under attack.

The appeal to this Court in *Courtesy* was dismissed for want of a substantial federal question, 375 U.S. 78 and a petition for rehearing was denied, 375 U.S. 960 (1963). If there ever was any doubt as to the meaning of such a decision, this Court made it clear in *Hicks* v. *Miranda,* 422 U.S. 332, 343 (1975) that a dismissal for want of a substantial federal question is a decision on the merits and, as such, constitutes binding precedent.

Therefore, unless the instant case is distinguishable from *Courtesy,* appellant's claim that the 1962 statutory

[11] Aside from the Port Authority Compact there are many other examples of Congressional consent to interstate agreements which expressly reserve to the compacting States the power to supplement the original compact by State action alone. Some examples are *New England Interstate Water Pollution Control Compact* (61 Stat. 682); *Western Regional Educational Compact* (67 Stat. 490); *La-Plata River Compact* (43 Stat. 796); and *Arkansas River Compact* (63 Stat. 145).

Moreover, there are many instances in which Congress has consented not just to amendments and supplements to existing agreements within the framework of their original scope but to wholly new interstate agreements yet to be drawn and identified only by subject matter in fields in which Congress wishes to encourage interstate agreements. Such blanket consents in advance to wholly new agreements are found, for example, for compacts dealing with forest and water conservation (16 U.S.C. § 552; 36 Stat. 961); navigation and flood control (33 U.S.C. § 567a; 49 Stat. 1490); offenses on waters forming state boundaries (33 U.S.C. § 11; 41 Stat. 1447); traffic safety (72 Stat. 635); comprehensive urban planning and agencies therefor (40 U.S.C. § 461(g); 88 Stat. 687); crime prevention and agencies therefor (4 U.S.C. § 111; 58 Stat. 575); and developing and operating airport facilities (49 U.S.C. § 1103a; 73 Stat. 333).

covenant requires specific Congressional consent should likewise be dismissed for want of a substantial federal question. Appellant, realizing this, attempts to argue that the statutory covenant involved in the instant case is in derogation of the purposes for which the Port Authority was created. His argument, however, lacks merit since it is evident that the covenant was enacted in furtherance, not in derogation, of the Port Authority's role as the States' joint or common agency to develop terminal, transportation and other facilities of commerce in the bi-State Port District. Thus the 1962 legislation expressly states that it is

> "in partial effectuation of and supplemental to the comprehensive plan heretofore adopted by the 2 said States for the development of the said port district". § 3, Ch. 8, Laws of N.J., 1962; § 3, Ch. 209, Laws of N.Y., 1962,

as well as

> "supplementary to the compact [the 1921 Port Compact] . . . and shall be liberally construed to effectuate the purposes of said compact and of the comprehensive plan heretofore adopted by the 2 States, and the powers granted to the port authority shall be construed to be in aid of and not in limitation or in derogation of any other powers heretofore conferred upon or granted to the port authority." § 17, Ch. 8, Laws of N.J., 1962; § 17, Ch. 209, Laws of N.Y., 1962.

The specific role of the covenant in further effectuating the Compact and comprehensive plan is demonstrated beyond doubt in the Report of the New Jersey Senate Committee which recommended inclusion of the covenant in the 1962 Hudson Tubes-World Trade Center legislation:

> "If the Port Authority were to receive such unrestricted responsibility [to operate deficit rail facilities] there is no question but that its sound credit position would be seriously impaired, if not destroyed, and it would

become impossible for the Authority to continue to move forward either with such a rail program or with other vital transportation and terminal facilities and other facilities of commerce desired by the 2 States in continuing the Port Authority's tradition as a public agency." Report, p. 24.

Thus, the 1962 statutory covenant did not strip the Port Authority of a pre-existing compact power, but, on the contrary, provided it, a self-supporting agency lacking access to tax resources, with a means of implementing, for the first time in its history, its authorization to develop and to operate rail passenger facilities. As found by the trial court, "The enactment of the 1962 covenant was indeed an attempt to satisfy an immediate public need to preserve the H&M as a viable public transportation system" (Gaby's Appendix, p. 106) and

> "the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority". (Gaby's Appendix, p. 90)

The 1962 covenant, enacted by the Legislatures, was perfectly consistent with the earlier covenants that the States had entered into with Port Authority bondholders. In the past, the purchasers of Port Authority bonds were concerned about potential legislative interference with Port Authority tolls and other fees and charges as well as the potential authorization of competitive facilities.[12] In 1962 purchasers of Port Authority bonds were concerned about the Authority's initial entry with its own funds into a field which was inherently incapable of profitable operation. As in the past, the Legislatures believed that statu-

[12] One reason for bondholder concern was that Port Authority bonds are open-ended; that is, there is no dollar limit on the quantity of new obligations which the Authority may, from time to time, issue—obligations which are on a par with earlier issues of Authority bonds.

tory assurances were needed if investors were to be persuaded to buy Port Authority securities. The result was the 1962 covenant.

Appellant's allegation that the 1962 covenant is in derogation of the Port Authority's Compact duties lacks merit for yet another reason. His claim that one of the original purposes for which the Port Authority was created was to perform deficit passenger rail activities is frivolous. Thus, although the 1920 report of the New York, New Jersey Port and Harbor Development Commission, which led to the creation of the Port Authority in 1921, and the 1922 comprehensive plan setting forth the Port Authority's initial duties were primarily concerned with a railroad problem, the trial court correctly pointed out that

> "the railroad problem upon which the Commission focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission addressed itself exclusively to the transportation and distribution, not of persons but of freight and cargo by rail, and to a lesser extent by ship and motor truck". (Gaby's Appendix, pp. 47-48)

Furthermore, the 1921 Compact and the 1922 comprehensive plan legislation did not envision that the Port Authority would engage in any deficit operations. These statutes expressly precluded the Authority from pledging the States' credit or levying taxes. What was contemplated was that the Authority would finance each of its projects by the sale of revenue bonds which would be repaid by user charges.

Indeed, each of the initial Port Authority facilities was separately financed pursuant to bi-State statutes. However, in 1931 after the Port Authority faced default on its early bridge bonds (Ja Vol. IV, p. 11) the pooling concept evolved and authorizing bi-State legislation was enacted. Ch. 5, Laws of N.J., 1931; Ch. 48, Laws of N.Y., 1931. This

1931 "pooling" legislation which allows the Authority to use surplus monies from one facility to make up the deficits of another gave to this agency, for the first time in its history, the capacity to construct projects which could not, a least initially, throw off enough revenues to pay both operating expenses and debt service.

"Pooling" is therefore the *sine qua non* for Port Authority operation of deficit facilities. Without it there would have been no PATH. Accordingly, we fail to see how appellant can argue that the 1962 covenant was a fundamental alteration of the 1921 Compact since it is the bi-State authorization to "pool" revenues and not any power under the specifically Congressionally consented-to Compact and comprehensive plan which gave the Port Authority financial power to undertake a deficit railroad operation.

As has been demonstrated, appellant's attempt to distinguish *Courtesy, supra,* on the ground that the 1962 covenant was in derogation of the Port Authority's purposes is based upon factual misconceptions as to the original purposes, duties and nature of the Port Authority.

Consequently, this Court's decision in *Courtesy, supra,* that bi-State legislation in furtherance of the Port Authority's purposes does not need additional Congressional consent is indistinguishable from the instant case and mandates the dismissal of this appeal for want of a substantial federal question.[13]

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[13] Although this brief has made it clear that Congressional consent exists for the 1962 statutory covenant, we should also point out that we do not believe that Congressional consent for this type of an agreement is even required. The leading Compact Clause case of *Virginia* v. *Tennessee,* 148 U.S. 503 (1893), noted that the Compact Clause, in the light of its historical origins and in the context of the other provisions in the Clause, has a more limited scope than the words "any agreement or compact" might suggest and formulated the following test for determining which compacts need consent:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 519.

It is evident that the 1962 statutory covenant, by no stretch of the imagination, can be construed as infringing upon the just supremacy of the United States. See *Kheel* v. *Port Authority,* 331 F.Supp. 118 (S.D.N.Y. 1971), *aff'd on other grounds,* 457 F.2d 46 (2nd Cir.), *cert. denied,* 409 U.S. 983 (1972).

Furthermore, it is clear from the purpose of the compact clause that consent to the 1921 compact and 1922 comprehensive plan did not impose a federal mandate on the states, but rather left the states free to assign or not assign specific tasks to the Port Authority without obtaining further congressional consent. See *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657, 725 (1838).

CONCLUSION

In view of the foregoing, it is respectfully submitted that the appeal by Mr. Gaby should be dismissed summarily for want of a substantial federal question.

Respectfully submitted,

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Dated: June 7, 1976

Proof of Service

I, JOSEPH LESSER, Assistant General Counsel for the Port Authority of New York and New Jersey, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of June 1976, I served copies of the foregoing Motion to Dismiss the Appeal of Daniel M. Gaby with Brief in Support thereof on the parties to this action, by mailing three copies thereof, in a duly addressed envelope, with first class postage prepaid, to each of the following:

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